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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL MOLINA GARCIA,

Defendant and Appellant.

F067736

(Super. Ct. No. SF016888A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Poochigian, J., and Franson, J.

Defendant Angel Molina Garcia was convicted by jury trial of being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1))¹ and possession of metal knuckles (§ 21810), offenses he committed on November 7, 2012. The jury found gang allegations true on both counts (§ 186.22, subd. (b)(1)), and the trial court found true the allegation that defendant had served three prior prison terms (§ 667.5, subd. (b)). The court sentenced him to 10 years in prison and imposed various fines and fees, including two \$280 restitution fines pursuant to sections 1202.4, subdivision (b) and 1202.45.

On appeal, defendant contends the trial court inadvertently imposed an unauthorized sentence and violated ex post facto principles when it imposed the \$280 restitution fines rather than the statutory minimum fines of \$240 in effect at the time he committed the crime in 2012.² We disagree with this contention. We agree, however, with the People that the abstract of judgment fails to reflect the judgment orally

¹ All statutory references are to the Penal Code.

² When defendant committed the offenses in this case, section 1202.4 provided in pertinent part: “(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but *shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012*, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014, *and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony*, and shall not be less than one hundred twenty dollars (\$120) starting on January 1, 2012, one hundred forty dollars (\$140) starting on January 1, 2013, and one hundred fifty dollars (\$150) starting on January 1, 2014, and not more than one thousand dollars (\$1,000), if the person is convicted of a misdemeanor.” (§ 1202.4, subd. (b)(1), as amended by Stats. 2011, ch. 358, § 1, italics added.)

Section 1202.45 provided in part: “In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine *in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.*” (§ 1202.45, as amended by Stats. 2007, ch. 302, § 15, italics added.)

pronounced by the court. Accordingly, we direct the trial court to amend the abstract of judgment, and we affirm the judgment as modified.

DISCUSSION

I. Restitution Fines

“Under the United States Constitution, ““any statute ... which makes more burdensome the punishment for a crime, after its commission ... is prohibited as *ex post facto*.”” [Citations.] The ex post facto clause of the state Constitution is in accord.” (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31.) The prohibition against ex post facto laws applies to restitution fines, which constitute punishment. (*People v. Souza* (2012) 54 Cal.4th 90, 143.) An increase in the minimum restitution fine makes the authorized punishment more burdensome. (*People v. Saelee, supra*, at pp. 30-31.) Therefore, a court cannot apply an increased minimum restitution fine retroactively to a defendant whose crime occurred prior to the increase in the minimum restitution fine.

But a defendant can forfeit an ex post facto claim by failing to raise the issue (see *People v. White* (1997) 55 Cal.App.4th 914, 917), particularly where any error could easily have been corrected if the issue had been raised at the sentencing hearing. Generally, in the interests of fairness and judicial economy, only “claims properly raised and preserved by the parties are reviewable on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).) ““It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.” [Citations.]” (*People v. Earp* (1999) 20 Cal.4th 826, 882.)

Although it is true that the forfeiture rule does not apply when a trial court imposes an unauthorized sentence (*Scott, supra*, 9 Cal.4th at p. 354), the sentence in this case was not unauthorized. An unauthorized sentence is one that “could not lawfully be imposed under any circumstance in the particular case.” (*Ibid.*) Under the version of section 1202.4 in effect when defendant committed the crimes, the trial court had the discretion to impose fines in an amount between \$240 and \$10,000. Because the \$280

finer imposed fell within that range, the fines were authorized and the trial court had the discretion to impose them.

The probation officer's report recommended that the trial court impose restitution fines of \$280 pursuant to sections 1202.4 and 1202.45. At sentencing, the trial court imposed sentence on counts 1 and 2, then asked defense counsel, "And in regard to the recommended fees and fines, submit as to those amounts?" Counsel answered, "Yes, your Honor," to which the court responded, "Those are ordered."

This record does not support a conclusion that the trial court intended to impose the minimum \$240 fines under the statutes. And we cannot assume the court intended to impose the minimum fines but was unaware that the applicable minimum was \$240. The court did not expressly state that it intended to impose the minimum fines, and we will not presume the court applied the wrong statutory law (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 ["It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties."].) The court may simply have been exercising its discretion to impose the fines it found appropriate. From the record, we can only conclude the trial court intended to impose the \$280 fines.

Under these circumstances, it was incumbent upon defendant to object to the fine amounts in the trial court and bring the alleged mistake to the court's attention. Defendant's failure to do so forfeits the claim on appeal. (*Scott, supra*, 9 Cal.4th at p. 353 [the forfeiture doctrine "should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices"].)

II. Abstract of Judgment

The People request that we instruct the trial court to amend the abstract of judgment so it correctly reflects the judgment orally imposed by the court. Specifically, they point out that the abstract fails to include the four-year section 186.22, subdivision (b)(1) enhancement connected to count 2.

At sentencing, the trial court sentenced defendant on count 2 as follows:

“You are sentenced to the Department of Corrections for the upper term of three years, enhanced by four years pursuant to Section 186.22[, subdivision](b)(1) of the Penal Code for a total fixed term of seven years. That’s concurrent with the sentence imposed in the prior count.”

We shall order that the abstract of judgment be amended to reflect this enhancement.

DISPOSITION

The trial court is instructed to amend the abstract of judgment to reflect a four-year enhancement pursuant to Penal Code section 186.22, subdivision (b)(1) on count 2. As so modified, the judgment is affirmed.